

1
2
3
4
5
6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 ROBERT MCGUIRE) 3:10-cv-00488-HDM (WGC)
10 Plaintiff,)
11 vs.)
12 STATE OF NEVADA, *ex. rel.*)
13 NEVADA DEPARTMENT OF)
14 CORRECTIONS, *et. al.*)
15 Defendants.)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

16 This Report and Recommendation is made to the Honorable Howard D. McKibben,
17 Senior United States District Judge. The action was referred to the undersigned Magistrate
18 Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4. Before
19 the court is Defendants' Motion for Summary Judgment. (Doc. # 79, Doc. # 81 (Errata).)¹
20 Plaintiff opposed (Doc. # 84) and Defendants have replied (Doc. # 92). After a thorough
21 review, the court recommends that Defendants' motion be denied.
22

I. BACKGROUND

23 At all relevant times, Plaintiff Robert McGuire (Plaintiff) was an inmate in custody of
24 the Nevada Department of Corrections (NDOC). (Pl.'s Compl. (Doc. # 10) at 1.) The events
25 giving rise to this litigation took place while Plaintiff was housed at Ely State Prison (ESP). (*Id.*)
26 Plaintiff, a *pro se* litigant, brings this action pursuant to 42 U.S.C. § 1983. (*Id.*) Plaintiff
27 originally filed his Complaint in the Seventh Judicial District Court of the State of Nevada, in
28

¹ Refers to court's docket number.

1 and for the County of White Pine, and it was subsequently removed. (See Doc. # 1.) Defendants
 2 are Tom Stubbs and David Drummond.²

3 Plaintiff alleges that on August 24, 2008, Defendants used excessive force against him
 4 while he was handcuffed and in leg irons, resulting in injuries that included a large swelling
 5 above his left temple that required surgery. (Doc. # 10 at 1.) He asserts that he continues to
 6 suffer dizziness, blurred vision, damaged nerves, headaches, and joint damage. (*Id.*) On
 7 screening, the court determined that Plaintiff states a colorable claim for excessive force under
 8 the Eighth Amendment. (Doc. # 9 at 4.)

9 Defendants move for summary judgment, arguing: (1) the force used was reasonable and
 10 not excessive; (2) Defendants were not in charge of the spontaneous use of hands on force
 11 involving Plaintiff, and were merely acting under the orders of Sergeant Ronald Bryant, and
 12 therefore did not personally participate in the alleged constitutional violation; (3) Defendants
 13 are entitled to qualified immunity; and (4) Plaintiff is not entitled to punitive damages.
 14 (Doc. # 79.)

15 II. LEGAL STANDARD

16 “The purpose of summary judgment is to avoid unnecessary trials when there is no
 17 dispute as to the facts before the court.” *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*,
 18 18 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted). All reasonable inferences are drawn in
 19 favor of the non-moving party. *In re Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citing
 20 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)). Summary judgment is appropriate
 21 if “the pleadings, the discovery and disclosure materials on file, and any affidavits show that
 22 there is no genuine issue as to any material fact and that the movant is entitled to judgment as
 23 a matter of law.” *Id.* (quoting Fed.R.Civ.P. 56(c)). Where reasonable minds could differ on the
 24 material facts at issue, however, summary judgment is not appropriate. See *Anderson*, 477 U.S.
 25 at 250.

26 The moving party bears the burden of informing the court of the basis for its motion,

28 ²The State of Nevada ex. rel. NDOC and Michael Lee were previously dismissed. See Docs. # 28, # 73.

1 together with evidence demonstrating the absence of any genuine issue of material fact.
 2 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Although the parties may submit evidence
 3 in an inadmissible form, only evidence which might be admissible at trial may be considered
 4 by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P. 56(c).

5 In evaluating the appropriateness of summary judgment, three steps are necessary:
 6 (1) determining whether a fact is material; (2) determining whether there is a genuine issue for
 7 the trier of fact, as determined by the documents submitted to the court; and (3) considering
 8 that evidence in light of the appropriate standard of proof. See *Anderson*, 477 U.S. at 248-250.
 9 As to materiality, only disputes over facts that might affect the outcome of the suit under the
 10 governing law will properly preclude the entry of summary judgment; factual disputes which
 11 are irrelevant or unnecessary will not be considered. *Id.* at 248.

12 In determining summary judgment, a court applies a burden shifting analysis. "When
 13 the party moving for summary judgment would bear the burden of proof at trial, 'it must come
 14 forward with evidence which would entitle it to a directed verdict if the evidence went
 15 uncontested at trial.'[] In such a case, the moving party has the initial burden of
 16 establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R.*
 17 *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal
 18 citations omitted). In contrast, when the nonmoving party bears the burden of proving the
 19 claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence
 20 to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the
 21 nonmoving party failed to make a showing sufficient to establish an element essential to that
 22 party's case on which that party will bear the burden of proof at trial. See *Celotex*, 477 U.S. at
 23 323-25. If the moving party fails to meet its initial burden, summary judgment must be denied
 24 and the court need not consider the nonmoving party's evidence. See *Adickes v. S.H. Kress &*
 25 *Co.*, 398 U.S. 144, 160 (1970).

26 If the moving party satisfies its initial burden, the burden shifts to the opposing party
 27 to establish that a genuine issue of material fact exists. See *Matsushita Elec. Indus. Co. v.*

1 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
 2 the opposing party need not establish a material issue of fact conclusively in its favor. It is
 3 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
 4 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
 5 *Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987)(quotation marks and citation omitted). The
 6 nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations
 7 that are unsupported by factual data. *Id.* Instead, the opposition must go beyond the assertions
 8 and allegations of the pleadings and set forth specific facts by producing competent evidence
 9 that shows a genuine issue for trial. See Fed.R.Civ.P. 56(e); *Celotex*, 477 U.S. at 324.

10 At summary judgment, a court’s function is not to weigh the evidence and determine the
 11 truth but to determine whether there is a genuine issue for trial. See *Anderson*, 477 U.S. at 249.
 12 While the evidence of the nonmovant is “to be believed, and all justifiable inferences are to be
 13 drawn in its favor,” if the evidence of the nonmoving party is merely colorable or is not
 14 significantly probative, summary judgment may be granted. *Id.* at 249-50, 255 (citations
 15 omitted).

III. DISCUSSION

A. Excessive Force Standard

18 The Eighth Amendment prohibits the imposition of cruel and unusual punishment. U.S.
 19 Const. amend. VIII. It “embodies broad and idealistic concepts of dignity, civilized standards,
 20 humanity, and decency.” *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal
 21 quotations omitted). The “unnecessary and wanton infliction of pain...constitutes cruel and
 22 unusual punishment forbidden by the Eighth Amendment.” *Id.* (quoting *Whitley v. Albers*,
 23 475 U.S. 312, 319 (1986)).

24 “[W]henever prison officials stand accused of using excessive physical force in violation
 25 of the [Eighth Amendment], the core judicial inquiry is...whether force was applied in a good-
 26 faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”
 27 *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992); see also *Whitley*, 475 U.S. at 320-21; *Watts v.*
 28

1 *McKinney*, 394 F.3d 710, 711 (9th Cir. 2005); *Martinez v. Stanford*, 323 F.3d 1178, 1184 (9th
 2 Cir. 2003). “When prison officials maliciously and sadistically use force to cause harm,
 3 contemporary standards of decency are always violated.” *Hudson*, 503 U.S. at 9 (citing *Whitley*,
 4 475 U.S. at 327).

5 In determining whether the use of force is excessive, courts are instructed to examine
 6 “the extent of the injury suffered by an inmate[,]” “the need for application of force, the
 7 relationship between that need and the amount of force used, the threat ‘reasonably perceived
 8 by the responsible officials,’ and ‘any efforts made to temper the severity of the forceful
 9 response.’” *Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).

10 An inmate need not establish serious injury; however, the lack of serious injury is
 11 relevant to the Eighth Amendment inquiry. *See Wilkins v. Gaddy*, 130 S.Ct. 1175, 1178 (2010).
 12 “The extent of injury may [] provide some indication of the amount of force applied.” *Id.*

13 That being said, not “every malevolent touch by a prison guard gives rise to a federal
 14 cause of action...The Eighth Amendment’s prohibition of ‘cruel and unusual’ punishments
 15 necessarily excludes from constitutional recognition *de minimis* uses of physical force,
 16 provided that the use of force is not of a sort ‘repugnant to the conscience of mankind.’”
 17 *Hudson*, 503 U.S. at 9-10 (quoting *Whitley*, 475 U.S. at 327); *see also Wilkins*, 130 S.Ct. 1178
 18 (“An inmate who complains of a ‘push or shove’ that causes no discernible injury almost
 19 certainly fails to state a valid excessive force claim.” (citing *Hudson*, 503 U.S. at 9)). “Injury
 20 and force, however, are only imperfectly correlated, and it is the latter that ultimately counts.
 21 An inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive
 22 force claim merely because he has the good fortune to escape without serious injury.” *Wilkins*,
 23 130 S.Ct. at 1178-79. If the nature of the injuries is more than *de minimis*, but still “relatively
 24 modest,” the inmate’s damages will likely be limited. *See id.* at 1180.

25 Courts must be deferential when reviewing the necessity of using force. *See Whitley*, 475
 26 U.S. at 321-22; *see also Norwood v. Vance*, 591 F.3d 1062, 1067 (9th Cir. 2009), cert. denied,
 27 131 S.Ct. 1465 (Feb. 22, 2011) (“Prison officials are entitled to deference whether a prisoner

1 challenges excessive force or conditions of confinement." (citing *Whitley*, 475 U.S. at 322)).

2 **B. Summary of Facts and Evidence**

3 On the date in question, August 24, 2008, defendant Stubbs and defendant Drummond
 4 were employed as correctional officers by NDOC and were assigned to ESP's Correctional
 5 Emergency Response Team (CERT). (Doc. # 79 at 4 ¶¶ 2-3; Doc. 79-6 at 2 ¶ 2 (Drummond
 6 Decl.); Doc. # 79-7 at 2 ¶ 2 (Stubbs Decl.)) Michael Lee and Scott Manning were also
 7 correctional officers assigned to CERT, and Ronald Bryant was the correctional sergeant
 8 assigned to CERT. (Doc. # 79 at 4 ¶¶ 4-6.) Plaintiff was an inmate in custody of NDOC, housed
 9 at ESP. (Doc. # 79-9 25:18-20 (McGuire Trans.)).³

10 At approximately 1:00 a.m. on August 24, 2008, an ESP correctional officer was stabbed
 11 by Plaintiff through the food slot of ESP cell number 2B-14 which, at that time, housed Plaintiff
 12 and a cell mate. (Doc. # 79 at 6 ¶ 11; *see also* Doc. # 79-9 at 25:21-25, 26:1-6, 19-24, 27:13-18
 13 (McGuire Trans.); Doc. # 84 at 7 ¶ 2 (McGuire Decl.)) This cell was part of a maximum lock
 14 up unit. (Doc. # 79 at 6 ¶ 11; *see also* Doc. # 79-9 25:23-24 (McGuire Trans.)) At around 3:00
 15 a.m., ESP's CERT arrived at the cell, and Plaintiff and his cell mate refused to submit to
 16 restraints. (Doc. # 79 at 7 ¶ 12; Doc. # 79-6 at 2 ¶ 3(Drummond Decl.); Doc. # 79-7 at 2
 17 ¶ 3 (Stubbs Decl.); *see also* Doc. # 79-9 at 29:9-13 (McGuire Trans.)) Thus, a planned use of
 18 force cell extraction commenced. (Doc. # 79 at 6; Doc. # 79-6 at 2 ¶ 3 (Drummond Decl.); Doc.
 19 # 79-7 at 2 ¶ 3 (Stubbs Decl.)) Chemical agents had to be applied to the cell to effectuate the
 20 extraction. (Doc. # 79-6 at 2 ¶ 3 (Drummond Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.); Doc.
 21 # 79-9 29:13-19 (McGuire Trans.); Doc. # 84 at 7 ¶ 3 (McGuire Decl.)) At around 3:21 a.m.,
 22 Plaintiff underwent a post cell extraction medical examination in the hallway. (Doc. # 79 at 6
 23 ¶ 13; Doc. # 79-9 29:12-15 (McGuire Trans.); Doc. # 84 at 7 ¶ 5 (McGuire Decl.)) After the
 24 medical examination, Plaintiff was physically escorted outside of the unit, across the yard, and
 25 into hallway of the property room by defendant Stubbs, defendant Drummond, Michael Lee,

26
 27 ³The page references to Plaintiff's deposition transcript are to the court's docket page numbers and the
 28 line numbers of the transcript, and not to the deposition transcript page numbers.

1 and Scott Manning, who were accompanied by Sergeant Bryant. (Doc. # 79 at 7-8 ¶ 15; Doc. #
 2 79-6 at 2 ¶ 3 (Drummond Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.); *see also* Doc. # 79-9
 3 29:24-25 (McGuire Trans.); Doc. # 84 at 7 ¶ 7 (McGuire Decl.).)

4 Defendants assert that during this escort to the property room, Plaintiff attempted to
 5 kick an officer, and Sergeant Bryant verbally warned Plaintiff not to kick backwards towards
 6 the escorting CERT officers. (Doc. # 79 at 8 ¶ 16; Doc. # 79-6 at 2-3 ¶ 3 (Drummond Decl.);
 7 Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.)) Subsequently, Plaintiff attempted to kick his foot
 8 backwards again, and Sergeant Bryant ordered a spontaneous use of hands on force. (Doc.
 9 # 79 at 8 ¶¶ 18-19; Doc. # 79-6 at 3 ¶ 3 (Drummond Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.))
 10 Sergeant Bryant ordered the CERT officers to place Plaintiff on the ground. (Doc. # 79 at 9
 11 ¶ 20; Doc. # 79-6 at 3 ¶ 3 (Drummond Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.)) Defendant
 12 Drummond assisted in placing Plaintiff on the ground by controlling his legs. (Doc. # 79 at 9
 13 ¶ 20; Doc. # 79-6 at 3 ¶ 3 (Drummond Decl.)) Defendant Stubbs assisted in placing Plaintiff
 14 on the ground by placing both hands on Plaintiff's right shoulder and applying pressure to
 15 secure Plaintiff on the ground. (Doc. # 79 at 9 ¶ 20; Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.)) A
 16 camera and medical staff were called for at this point. (Doc. # 79-6 at 3 ¶ 3 (Drummond Decl.))
 17 This is the incident out of which Plaintiff's excessive force claim arises (and not the earlier
 18 planned use of force cell extraction). (Doc. # 79 at 9 ¶ 23.)

19 Plaintiff asserts that when he was being escorted to the property room, his right big toe
 20 got caught in the shackle chain and he shook it to get it free, and Sergeant Bryant warned him
 21 if he kicked back at the officers he would use the taser. (Doc. # 79-9 31:1-8 (McGuire Trans.);
 22 Doc. # 84 at 7 ¶ 7 (McGuire Decl.)) Plaintiff asserts that he told the officers, "I'm not kicking
 23 at you guys. You guys got to slow down. I'm tripping on this chain." (Doc. # 79-9 at 31:7-10
 24 (McGuire Trans.); Doc. # 84 at 7 ¶ 7 (McGuire Decl.)) Plaintiff asserts that they continued on,
 25 but the officers did not slow down, and Plaintiff's toe got caught in the chain again. (Doc. # 79-
 26 9 at 31:12-20 (McGuire Trans.); Doc. # 84 at 7 ¶ 7 (McGuire Decl.)) Before Plaintiff could get
 27 his foot back underneath him, he claims that both his feet were taken out from under him and
 28

1 he was dragged to the entrance of the property room, and Sergeant Bryant said, "I've had
 2 enough. Put him down." (Doc. # 79-9 at 31:20-25, 32: 1, 40:15-25 (McGuire Trans.); Doc.
 3 # 79-10 at 1:1-13 (McGuire Trans.); Doc. # 84 at 7 ¶ 7 (McGuire Decl.).) Plaintiff claims he was
 4 dragged into the hallway, and the next thing Plaintiff remembered was his head hitting the
 5 floor really hard, being hit twenty to thirty times in the face and neck, and feeling an officer's
 6 right knee hit his head. (Doc. # 79-9 at 32:1-25, 39:15-20, 40:2-12 (McGuire Trans.); Doc. # 84
 7 at 7 ¶¶ 7-9 (McGuire Decl.).)

8 At approximately 3:30 a.m., Plaintiff underwent a post spontaneous use of hands on
 9 force medical examination in the property room hallway. (Doc. # 79 at 9 ¶ 24; Doc. # 79-6 at
 10 3 ¶ 3 (Drummond Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.); *see also* Doc. # 79-9) at 33:11-12
 11 (McGuire Trans.); Doc. # 84 at 7 ¶ 10 (McGuire Decl.).) Plaintiff claims to have told the nurse
 12 that he felt dizzy, and he thought he was going to vomit and pass out. (Doc. # 84 at 7 ¶ 11.) He
 13 asserts that the nurse looked him over, but offered no other treatment even though he was
 14 bleeding and had open wounds. (*Id.*) Upon completion of the medical examination, Plaintiff
 15 was escorted to cell number two in the property room. (Doc. # 79-6 at 3 ¶ 3 (Drummond
 16 Decl.); Doc. # 79-7 at 2 ¶ 3 (Stubbs Decl.); Doc. # 79-9 at 34:12-17 (McGuire Trans.).)

17 An Unusual Occurrence Report was prepared concerning the medical examination
 18 following the spontaneous use of force. (Doc. # 79 at 9 ¶ 24; Doc. # 78 at 3 (Ex. A-2).) The
 19 Unusual Occurrence Report notes the following objective medical findings: a gash above the
 20 right eye, nose bleed, lump on the left temporal side of the head, a small abrasion on the top
 21 of the head, and no profuse bleeding. (*Id.*) It also notes the following subjective complaints:
 22 Plaintiff stated that he felt dizzy, and he felt like passing out. (Doc. # 78 at 3 (Ex. A-2).)
 23 Plaintiff was to be monitored and referred to a provider if necessary. (*Id.*)

24 At his deposition, Plaintiff testified about the extent of the injuries he suffered as a result
 25 of the spontaneous use of force. Plaintiff claims that he was still bleeding significantly the day
 26 after the incident. (Doc. # 79-9 at 35:9-12 (McGuire Trans.).) He had a lot of swelling under his
 27 left temple that pushed his eye closed. (Doc. # 79-10 at 19:9-15 (McGuire Trans.).) He could
 28

1 barely open his mouth, and could not feel his hands for approximately two weeks after the
 2 incident. (*Id.* at 19:17-19.) His right forearm was cut open, and he had multiple abrasions on
 3 his knees, and the tops of both of his feet were split open. (*Id.* at 19:23-25, 20:1-3.) Plaintiff
 4 claims that he experienced sharp pain in the back of his neck, as well as migraines and pain in
 5 his back. (*Id.* at 20:4-15.) Plaintiff asserts that he still has a “pins and needle[s] feeling[]” in
 6 his wrists. (*Id.* at 20:15-19.) He asserts that the bump near his temple continued to grow from
 7 the date of the incident until February, 2010, when he eventually had to undergo surgery. (*Id.*
 8 at 21:1-6, 25:3-4; *see also* Doc. # 84 at 8 ¶¶ 14, 16 (McGuire Decl.).) Plaintiff also claims to
 9 have suffered emotional injuries as a result of the incident. (Doc. # 79-10 (McGuire Trans.)
 10 at 28:15-25, 29:1-10, 32:3-25.)

11 In support of his opposition, Plaintiff submitted medical records, and the relevant
 12 portions span from August 27, 2008 through February 12, 2010. (*See* Doc. # 90.) The progress
 13 notes entry for the date of the incident, August 24, 2008, references the Unusual Occurrence
 14 Report. (*Id.* at 10.) The entry dated August 27, 2008, several days after the incident, indicates
 15 the observation of black eyes and abrasions on Plaintiff's face. (*Id.*) Plaintiff denied blurry
 16 vision or headaches at that time. (*Id.*) No further action was recommended. (*Id.*) Plaintiff was
 17 next seen on September 26, 2008, for complaints of a bump on his head in connection with the
 18 use of force on August 24, 2008. (*Id.*)

19 Plaintiff was seen on December 22, 2008, for complaints of back pain. (Doc. # 90 at 9.)
 20 He was told to kite for a new mattress and to stop exercising until his back no longer hurt. (*Id.*)

21 On May 12, 2009, Plaintiff complained of a tender, protruding blood vessel that he had
 22 on his head since August 2008. (Doc. # 90 at 9.) He appeared in no acute distress. (*Id.*) A
 23 consultation was scheduled with Dr. Mar. (*Id.*) Plaintiff was seen regarding the left temporal
 24 injury again on June 2, 2009. (*Id.* at 8.) On October 6, 2009, Plaintiff reported that the bump
 25 had gotten larger. (*Id.*) He was referred for a surgery consultation. (*Id.*) He was seen once again
 26 regarding the bump on his forehead on November 4, 2009, when it was noted to be a large
 27 cystic lesion. (*Id.* at 7.) He was referred to Dr. Gedney for an evaluation. (*Id.*)

1 On November 30, 2009, Plaintiff complained of "electric pain" in his back, neck and
 2 head on the left side. (Doc. # 90 at 7.) He was seen for his head condition again on
 3 December 8 and 17, 2009. (*Id.* at 6.) He was transferred for a consultation with Dr. Gedney.
 4 (*Id.*) At that time, it was noted that Plaintiff was receiving medication for migraines. (*Id.*)

5 Plaintiff was seen again on December 30, 2009. (Doc. # 90 at 5.) Plaintiff relayed that
 6 he had a head injury from August of 2008, when he claimed to have received blows to the head.
 7 (*Id.*) He reported experiencing migraines. (*Id.*) The progress notes indicate the observation of
 8 the lump on the left side of Plaintiff's head. (*Id.*) It was diagnosed as a "probable old
 9 hematoma" and Plaintiff was referred to a surgeon for possible surgery and opinion. (*Id.* at 4.)
 10 The hematoma was removed in February of 2010. (*See id.* at 3-4.)

11 There is no video of the spontaneous use of hands on force, but a video recording does
 12 exist of the events that occurred *afterwards*. (Doc. # 79 at 9 ¶¶ 22, 25.) The video shows the
 13 initial planned use of force cell extraction, and some time later follows an officer who is
 14 responding to the property room after a spontaneous use of force. (Doc. # 77 (Ex. F) (submitted
 15 in chambers) at approximately 35:05.) The video does show Plaintiff on the ground outside the
 16 property room, the medical examination conducted after the spontaneous use of force, and
 17 what appears to blood on the ground after Plaintiff had been removed from the ground and
 18 taken to the cell in the property room. (*See id.* from approximately 36:35 to 42:40.)

19 Sergeant Bryant prepared an incident report following the incident. (Doc. # 79-2 at 3
 20 (Ex. A-1).) Sergeant Bryant's report states the following:

21 On August 24, 2008 at approximately 0325 hrs Inmate McGuire, Robert
 22 # 83383 was being escorted to property cell #2 subsequent to another incident
 23 in which inmate McGuire attempted to stab an officer and chemical agents had
 24 to be used to remove him and his cellmate from cell 2B14. During the escort on
 25 the phase one yard walkway at the turn near the court yard swing gate at Ely
 26 State Prison Inmate McGuire struck backwards with his right foot attempting to
 27 strike escorting officers. I Correctional Sergeant Ronald Bryant gave Inmate
 28 McGuire clear verbal orders not to attempt to kick officers or force would be
 used. As the escorting officers were entering the property hallway through the
 side door Inmate McGuire again attempted to strike escorting officers with his
 right foot by kicking backwards towards me. I ordered escorting officers to place
 Inmate McGuire on the floor and secure him there. Officers used hands on force
 and placed Inmate McGuire on the ground. I notified shift Commanded [sic]
 Lieutenant Tony Jones of the spontaneous use of force and requested a

1 supervisor and camera to respond. Support staff arrived with video camera.
2 Inmate McGuire was seen by medical and escorted to cell # 2 in property without
further incident. See IR-2008-ESP-000921 for use of force reports and incident
file.

3 (Doc. # 79-2 at 3 (Ex. A-1).)

4 Sergeant Bryant appears to have authored a second incident report which states, in
5 pertinent part:

6 At approximately 0317 hrs I supervised the escort of Inmate McGuire into unit
one-two hallway so medical staff could examine him for injuries. At approximate
7 0320 hrs I escorted the Inmate McGuire from Unit 2 to the property holding
area. I was responsible for the use of an electronic tazer if necessary during the
8 escort. At approximately 0325 hrs during the escort as the escort was making the
turn towards property in front of the swing gate area Inmate McGuire attempted
9 to kick at escorting officers with right leg going backwards. I gave Inmate
McGuire [sic] that if he didn't walk without resisting he would be tasered. The
10 escort continued and at approximately 0327 hrs as the escort was entering the
property hallway through the door Inmate McGuire again attempted to kick
escorting officers with his right leg in a backwards motion. I then ordered the
11 escorting officers to place Inmate McGuire on the ground and securing [sic] him
there. Officers used hands on force and placed Inmate McGuire on the floor of
the Property hallway. I notified Lieutenant Jones that spontaneous force had
13 been used please respond with camera operator to property. At approximately
14 0335 hrs staff arrived and Inmate McGuire was seen by medical and checked for
injuries. I briefed on camera what had transpired leading to the use of force.

(Doc. # 79-2 at 23 (Ex. A-1).)

15 Correctional Officer Scott Manning's incident report states, in pertinent part:
16

Orders were then given to escort Inmate Robert McGuire NDOC # 83383 to the
Property holding cell # 2. During the escort inmate Robert McGuire NDOC
83383 attempted to kick at the officers legs. Orders were given to inmate
Robert McGuire NDOC # 83383 to not attempt that again. Once at the Property
side door, inmate Robert McGuire NDOC # 83383 again attempted to kick at the
officers legs. Orders were given to place him on the ground. I assisted in placing
inmate Robert McGuire # 83383 to the ground by placing my left hand on his
right shoulder and my right hand on his right forearm. I then applied a
downward motion and placed inmate Robert McGuire NDOC # 83383 to the
ground by utilizing my left hand in the upper portion of his back and utilized my
right hand in holding his head still as to stop the inmate from turning his head.
Once the command was given to place Inmate Robert McGuire NDOC # 83383
to his feet, I then assisted in lifting him up on his right side. Inmate Robert
McGuire was then evaluated by medical staff and orders were given to place him
in property holding cell # 2. At approximately 3:35 AM, I then continued to
assist the escort and placed Inmate Robert McGuire NDOC # 83383 in property
holding cell # 2.

(Doc. # 79-2 at 12 (Ex. A-1).)

26 ///

27 ///

28

1 Defendant Drummonds' incident report states, in pertinent part:

2 After Inmate McGuire was examined team number one was then ordered to
3 escort the inmate to the property room cell number 2. As inmate McGuire was
4 being escorted he attempted to kick an officer at this time Sgt. Bryant warned
5 Inmate McGuire that if he attempted to kick an officer again that the tazer would
6 be used. As Inmate McGuire was being escorted into the property room outer
7 door he attempted to kick an officer. At this time the order was given to place the
8 Inmate on the ground. Inmate McGuire was placed on the ground and at this
9 time Officer David Drummond controlled the Inmates legs at this time a camera
10 and medical staff was called for. Inmate McGuire was examined by medical staff.
11 Upon completion of the examination Inmate McGuire was escorted to Cell # 2
12 in the property room.

(Doc. # 79-2 at 13 (Ex. A-1).)

Defendant Drummond denies that Plaintiff was dragged, punched, or stricken during
the spontaneous use of hands on force. (Doc. # 79-6 at 3 ¶¶ 4-6 (Drummond Decl.).)
Defendant Drummond maintains that he used only that amount of force which was necessary
under the circumstances. (*Id.* ¶ 7.)

Correctional Officer Michael Lee's incident report states, in pertinent part:

I then assisted in escorting Inmate McGuire to Property Intake cell # 2. During
the escort inmate McGuire attempted to kick back and Seargent [sic] Bryant
advised McGuire that if this happened again he would be placed on the ground.
Upon arrival at the property door Inmate McGuire # 83383 attempted to kick
back a second time at escorting officers when Seargent [sic] Bryant gave the
order to place Inmate McGuire on the ground. At this time I maintained control
of McGuire's left arm and forced him to the ground, securing him until medical
staff arrived. Upon arrival of medical staff I assisted in getting McGuire to his
feet for medical assessment, see medical report. Inmate McGuire was then
escorted to property cell # 2 where I removed leg restraints without further
incident.

(Doc. # 79-2 at 14 (Ex. A-1).)

Defendant Stubbs' incident report states, in pertinent part:

After the chemical agents were used Inmates McGuire # 83383 and [redacted]
was [sic] restrained, I then assisted in escorting Inmate McGuire # 83383 to
property where he was to be put in cell 2. Once in the property hall way Inmate
McGuire # 83383 then tried to kick at an officer at which time I assisted in
placing the Inmate on the ground by placing both hands on his right shoulder
and applying pressure to secure him to the ground. Once Inmate McGuire
83383 was secured on the ground I assisted by placing my left hand on his
head and my right hand on his left shoulder to keep him from moving around.
At that time the camera arrived and he was then looked at by medical and placed
in cell 2 in property with no further incident.

(Doc. # 79-2 at 16 (Ex. A-1).)

Defendants Stubbs maintains that Plaintiff was never dragged, punched, or stricken

1 during the spontaneous use of force, and he used only the amount of force that was necessary
 2 under the circumstances. (Doc. # 79-7 at 3 ¶¶ 4-8 (Stubbs Decl.).)

3 Plaintiff claims that after the incident, in January of 2011, defendant Stubbs admitted
 4 to assaulting him and explained that it was to set a precedent as Plaintiff had assaulted a guard
 5 that day. (Doc. # 84 at 8 ¶ 19 (McGuire Decl.).)

6 **C. Defendants' argument**

7 Defendants contend that the use of force on August 24, 2008, was reasonable under the
 8 circumstances. (Doc. # 79 at 13-15.) First, Defendants argue that Plaintiff's injuries were not
 9 so serious as to require transport to the prison's medical facility, and were consistent with the
 10 amount of force necessary to secure a non-compliant prisoner on the ground. (*Id.* at 13.)
 11 Second, Defendants assert there is no evidence to support Plaintiff's claim that Defendants
 12 punched or struck him other than Plaintiff's own self-serving testimony. (*Id.* at 14.) Third,
 13 Defendants claim that the circumstances, including the fact that a correctional officer had been
 14 stabbed through the food slot of Plaintiff's cell earlier, chemical agents had to be used to extract
 15 Plaintiff and his cell mate from the cell, and Plaintiff had been observed kicking backwards
 16 towards the officers, warranted the spontaneous use of hands on force. (*Id.*)

17 Defendants also argue that summary judgment should be granted because they were
 18 simply acting according to Sergeant Bryant's orders. (Doc. # 79 at 15-16.)

19 Lastly, Defendants contend they are entitled to qualified immunity, and that Plaintiff
 20 may not recover punitive damages. (Doc. # 79 at 16-19.)

21 **D. Plaintiff's argument**

22 Plaintiff asserts the following preliminary issues: (1) summary judgment is
 23 inappropriate because there are ongoing discovery disputes; and (2) Plaintiff's deposition
 24 should not be considered because Defendants did not specify how the deposition would be
 25 recorded in the deposition notice. (Doc. # 84 at 1.)

26 On a substantive basis, Plaintiff argues that genuine issues of material fact exist as to
 27 whether Defendants used excessive force on August 24, 2008. (Doc. # 84. at 2-3.) First,
 28

1 Plaintiff asserts that he was not trying to kick the officers as Defendants suggest, and even if
2 he did, the force utilized in response was excessive. (Doc. # 84 at 2 ¶ C.) Second, Plaintiff
3 argues that force was not utilized in a good faith effort to maintain or restore discipline, but in
4 retaliation for Plaintiff's earlier assault of a correctional officer. (*Id.* at ¶ D, Doc. # 84 at 8 ¶ 27.)
5 Third, Plaintiff claims that the extent of his injuries establish that the force utilized was
6 excessive. (Doc. # 84 at 2 ¶ E.) Plaintiff emphasizes the seriousness of the injuries he suffered,
7 and claims that his injuries resulted in his having surgery and suffering from ongoing
8 neurological problems. (*Id.*) Fourth, Plaintiff states that he was not simply taken two feet to
9 the ground as Defendants suggest. (*Id.* at 3 ¶ G.) Instead, he maintains that he was dragged,
10 slammed against the ground, and punched twenty to thirty times. (*Id.*) He believes the assault
11 was perpetrated by defendant Stubbs and that defendant Drummond sat by and watched and
12 did nothing to stop the assault. (*Id.* at ¶ H.) Finally, Plaintiff asserts that punitive damages are
13 justified because the use of force was sadistic and malicious and not in good faith. (*Id.* at 5.)

14 **E. Analysis**

15 **1. Preliminary Issues**

16 First, Plaintiff's argument that summary judgment is inappropriate because of ongoing
17 discovery disputes (see Doc. # 84 at 1) is moot in light of the court's issuance of orders denying
18 his motion to compel, and denying his request for reconsideration. (See Docs. # 83, 96.)

19 Second, Plaintiff objects to the utilization of his deposition transcript in connection with
20 the instant motion because the deposition notice did not state the manner in which the
21 deposition would be recorded. (Doc. # 84 at 1.) The court notes that Plaintiff failed to provide
22 the court with a copy of the deposition notice so the court could undertake an analysis of the
23 propriety of the notice. Moreover, Defendants are correct that they were granted leave of court
24 to take Plaintiff's deposition, and at that time, Plaintiff was informed that Plaintiff would be
25 given a copy of his deposition transcript at Defendants' expense. (See Doc. # 92 at 2, Docs. #
26 44, # 45.) Plaintiff had notice that his deposition would be transcribed and that he would
27 receive a copy of the transcript at Defendants' expense. In addition, Plaintiff went forward with
28

1 his deposition in spite of the asserted procedural defect. Accordingly, the court finds Plaintiff's
 2 deposition transcript is properly considered in connection with the instant motion.

3 Finally, the court takes note of Defendants' objections to the court's consideration of
 4 paragraphs 6, 15, 17, 18, 20-23, 25-28, and 30 of Plaintiff's declaration on the bases that the
 5 statements set forth therein are inadmissible, contain statements that have not been made on
 6 personal knowledge, and/or concern matters of which Plaintiff is not competent to testify.
 7 (Doc. # 92 at 6.) While asserting this blanket generalization, Defendants do not provide an
 8 analysis with respect to each paragraph in order to inform the court of the specific reason the
 9 paragraph should not be considered. Instead, the court is left to guess which of the three
 10 generalized bases asserted by Defendants apply. Notwithstanding Defendants' failure to
 11 specially argue why a certain paragraph is improper, the court will review the propriety of each
 12 of the statements, in turn.

13 Paragraph 6 states, "[t]he video camera operator was told to turn camera away from me
 14 at this point by Lt. Jones against operational procedure and Administrative Regulations [sic]
 15 405." (Doc. # 84 at 7 ¶ 6.) This statement appears to contain inadmissible hearsay; however,
 16 the court is not presented with sufficient information to determine whether an exception
 17 applies. Nevertheless, the court does not find this paragraph to be relevant to the issue of
 18 whether Defendants used excessive force, and therefore, it will not be considered.

19 Paragraph 15 contains a statement about conclusions drawn by Plaintiff's medical
 20 providers. (Doc. # 84 at 8 ¶ 15.) The court will not consider Plaintiff's statement, but rather,
 21 will review and take into consideration the medical records submitted in support of Plaintiff's
 22 opposition. (See Doc. # 90.)

23 Paragraph 17 states, "I received nerve damage and migraine headaches from this
 24 incident." (Doc. # 84 at 8 ¶ 17.) Plaintiff is permitted to testify regarding his perceptions of his
 25 own health condition; however, the court will rely on the medical records regarding any actual
 26 diagnoses. (See Doc. # 90.)

27 Paragraph 18 states, "I have been denied head/brain scans that would prove the

1 nerve/brain injury. Even though I was told on numerous occasions that I would see a specialist;
 2 which I still haven't." (Doc. # 84 at 8 ¶ 18.) This action does not involve an Eighth Amendment
 3 deliberate indifference to medical care claim; therefore, this statement is irrelevant.

4 Paragraphs 20-23 contain statements regarding alleged prior incidents of excessive force
 5 at ESP and are not relevant to whether or not excessive force was applied to Plaintiff on August
 6 24, 2008. (See Doc. # 84 at 8 ¶¶ 20-23.)

7 Paragraphs 25-26 are more appropriately considered as part of Plaintiff's legal
 8 argument, and the court will treat them as such. (Doc. # 84 at 8 ¶ 25.)

9 Paragraph 27 states, "[o]fficers did not use hands on force to restore, or maintain order
 10 but to assault met and cause me serious injury in a sadistic manner." Plaintiff is allowed to
 11 assert his perception that the officers use of force was malicious and sadistic, just as Defendants
 12 are allowed to contend that their use of force was reasonable and in good faith. (See Doc. # 79-
 13 6 at 3 ¶¶ 7-8 (Drummond Decl.) ("I did not personally use any force beyond that which was
 14 authorized and necessary under the circumstances, and/or that I would regard as excessive..." "
 15 "I did not witness Tom Stubbs or any other NDOC staff member using force beyond that which
 16 was authorized and necessary under the circumstances, and/or that I would regard as
 17 excessive..."); Doc. # 79-7 at 3 ¶¶ 7-8 ("I did not personally use any force beyond that which was
 18 authorized and necessary under the circumstances, and/or that I would regard as excessive..." "
 19 "I did not witness any NDOC staff member using force beyond that which was authorized and
 20 necessary under the circumstances, and/or that I would regard as excessive...").)

21 In paragraph 28, Plaintiff asserts that the Department of Justice was undertaking an
 22 investigation of this incident. This statement is not relevant to the instant litigation. Nor is
 23 Plaintiff's statement in paragraph 30 regarding his perception of the adequacy of the prison's
 24 investigation and its effect on subsequent alleged incidents relevant to this litigation. The court
 25 will disregard these assertions.

26 **2. Genuine Issues of Material Fact Exist**

27 Viewing the evidence in the light most favorable to Plaintiff, as the court must, the court

1 finds that genuine issues of material fact exist as to whether the force applied to Plaintiff on
2 August 24, 2008, in connection with the spontaneous use of force near the property room, was
3 in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause
4 harm. *See Hudson*, 503 U.S. at 6-7.

5 First, there are material factual issues regarding the need for the application of force,
6 the amount of force used, and the relationship between these elements. Defendants contend
7 that Plaintiff attempted to kick back towards officers and was warned that conduct would result
8 in the use of a taser. Defendants claim that Plaintiff again kicked back toward officers and
9 Sergeant Bryant gave the order to take Plaintiff down. Plaintiff, on the other hand, asserts that
10 he never tried to kick back at the officers, but instead was tripping on the ankle chain. He
11 claims that he informed the officers of this and asked them to slow down, to no avail. When he
12 tripped again, this culminated in the use of force. While Defendants argue that they used only
13 that amount of force that was necessary to take Plaintiff down to the ground and secure him
14 there, Plaintiff maintains that he was dragged, slammed into the ground, and then punched
15 twenty to thirty times. The fact finder will need to resolve the differing versions of events that
16 took place with respect to the circumstances leading up to the use of force and the amount of
17 force used.

18 Second, there are material factual issues regarding the extent of Plaintiff's injuries.
19 While Defendants claim that the injuries sustained were a reasonable consequence under the
20 circumstances, Plaintiff maintains that he suffered significant injuries, including those
21 referenced in the Unusual Occurrence Report, and additionally that he suffered abrasions to
22 his knees and arms, headaches, migraines, back and neck pain, and that he eventually had to
23 undergo surgery to remove the lump near his temple. In addition, while the Unusual
24 Occurrence Report states that there was no profuse bleeding, the video appears to show a
25 pooling of blood on the ground where the incident occurred. Again, a fact finder should be
26 tasked with resolving these disputes concerning Plaintiff's injuries in determining whether the
27 force utilized was reasonable or excessive.

28

1 In light of the these material factual issues, summary judgment should be denied.

2 **3. Personal Participation**

3 Despite admitting their direct involvement in the spontaneous use of hands on force,
 4 Defendants argue that they are entitled to summary judgment on the basis that they did not
 5 personally participate in the alleged constitutional violation because they were merely following
 6 the orders of Sergeant Bryant. (Doc. # 79 at 15-16.)

7 Defendants' reading of the law regarding personal participation in section 1983 cases
 8 is completely unsupported. Defendants cite authority concerning supervisory liability, and
 9 utilize it to support their argument that they should somehow be relieved of potential liability
 10 for their direct participation in the use of force. (Doc. # 79 at 15-16.)

11 While the court has found that material factual issues exist with respect to the reason
 12 for the use of force, the amount of force used, and the extent of Plaintiff's injuries, Defendants
 13 do not dispute they directly participated in the spontaneous use of force involving Plaintiff on
 14 August 24, 2008. (Doc. # 79-6 at 2-3 ¶¶2, 3 (Drummond Decl.) ("I controlled Inmate Robert
 15 McGuire's (#83383) legs"); Doc. # 78-7 at 2 ¶¶2-3 (Stubbs Decl.) ("I assisted in placing Inmate
 16 Robert McGuire (#83383) on he ground by placing both hands on his right shoulder and
 17 applying pressure to secure him to the ground. Once Inmate Robert McGuire (#83383) was
 18 secured on the ground, I assisted by placing my left hand on his head and my right hand on his
 19 left shoulder to keep him from moving around.").) It is well established that "a person 'subjects'
 20 another to the deprivation of a constitutional right, within the meaning of § 1983, 'if he does
 21 an affirmative act, participates in another's affirmative act, or omits to perform an act which
 22 he is legally required to do that causes the deprivation of which complaint is made.'"

23 *Preschooler II v. Clark County School Bd. of Trustees*, 479 F.3d 1175, 1183 (9th Cir. 2007)
 24 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978)). If Plaintiff's version of events
 25 is believed, a fact finder may conclude that Defendants' conduct alone amounts to a violation
 26 of the Eighth Amendment. The fact that Sergeant Bryant gave an order to take Plaintiff down
 27 to the ground does not absolve these defendants of potential liability for their own conduct.

1 Nor is defendant Drummond relieved of liability if a jury believes Plaintiff's story that
 2 defendant Stubbs inflicted the excessive blows while defendant Drummond idly sat by and did
 3 nothing to stop him. *See, e.g., Clem v. Lomeli*, 566 F.3d 1177, 1181 ("[V]iolations of the Eighth
 4 Amendment may occur as a result of either 'a prison official's act or omission.' " (quoting
 5 *Farmer v. Brennan*, 511 U.S. 825, 834 (1970)) (emphasis original)).

6 **4. Qualified Immunity**

7 Defendants argue that they are entitled to qualified immunity because Plaintiff cannot
 8 set forth facts that would allow a juror to determine that Defendants violated the Eighth
 9 Amendment, because they were merely following Sergeant Bryant's orders. (Doc. # 79 at 16-
 10 18.)

11 "Qualified immunity shields federal and state officials from money damages unless a
 12 plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and
 13 (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v.*
14 al-Kidd, 131 S.Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982));
see also Padilla v. Yoo (9th Cir. 2012); *Pearson v. Callahan*, 555 U.S. 223 (2009).

15 A "[g]overnment official's conduct violates clearly established law when, at the time of
 16 the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every
 17 'reasonable official would have understood that what he is doing violates that right.'" *al-Kidd*,
18 131 S.Ct. at 2083 (alterations in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640
 19 (1987)); *see also Padilla v. Yoo* (9th Cir. 2012). "We do not require a case directly on point, but
 20 existing precedent must have placed the statutory or constitutional question beyond debate."
21 Id. "Qualified immunity gives government officials breathing room to make reasonable but
 22 mistaken judgments about open legal questions," and courts are "not to define clearly
 23 established law at a high level of generality[.]" *Id.* at 2084-85; *see also Dunn v. Castro*, 621
24 F.3d 1196, 1201 (9th Cir. 2010) ("[T]he right allegedly violated must be defined at the
 25 appropriate level of specificity before a court can determine if it was clearly established.").

26 Whether a constitutional right was violated and whether the right was clearly established
 27 at the time of the violation are legal questions for the court. *See Serrano v. Francis*, 345 F.3d
 28

1 1071, 1080 (9th Cir. 2003); *Martinez v. Stanford*, 323 F.3d 1178, 1183 (9th Cir. 2003).
 2 However, “[i]f a genuine issue of material fact exists that prevents a determination of qualified
 3 immunity at summary judgment, the case must proceed to trial.” *Serrano*, 345 F.3d at 1077.
 4 The court determined that Plaintiff has alleged a colorable claim for excessive force
 5 under the Eighth Amendment. Therefore, the only remaining question under qualified
 6 immunity is whether the law regarding excessive force was sufficiently clear on August 24,
 7 2008, when the spontaneous use of hands on force occurred. Whether or not the force applied
 8 in this instance was excessive is a question for the jury. Notwithstanding the existence of
 9 material factual issues, the court finds there is no doubt that on August 24, 2008, the law was
 10 clear that when force is used in a malicious and sadistic manner to cause harm, and not in a
 11 good-faith effort to maintain or restore discipline, the constitution is violated. *See Hudson*,
 12 503 U.S. at 6-7, 9. As a result, the court finds Defendants are not entitled to qualified
 13 immunity.

14 **5. Punitive Damages**

15 Defendants argue that punitive damages should not be available to Plaintiff because the
 16 only evidence that supports Plaintiff’s excessive force claim is his own self-serving testimony.
 17 (Doc. # 79 at 18-19.)

18 Plaintiff argues that punitive damages are appropriate because the use of force was
 19 malicious and sadistic and not in a good faith effort to restore discipline and order. (Doc. # 84
 20 at 5.)

21 Punitive damages are recoverable in section 1983 actions. *See Pac. Mut. Life Ins. Co.*
 22 v. *Haslip*, 499 U.S. 1, 17 (1991); *Kentucky v. Graham*, 473 U.S. 159, 167 n. 13 (1985); *Dang*
 23 v. *Cross*, 422 F.3d 800, 807 (9th Cir. 2005). Punitive damages may be awarded if there is a
 24 finding that a defendant’s conduct:

25 was malicious, oppressive or in reckless disregard of the plaintiff’s rights.
 26 Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the
 27 purpose of injuring another. Conduct is in reckless disregard of the plaintiff’s
 28 rights if, under the circumstances, it reflects complete indifference to the
 plaintiff’s safety or rights, or the defendant acts in the face of a perceived risk that
 its actions will violate the plaintiff’s rights under federal law. An act or omission

1 is oppressive if the person who [performs] [fails to perform] it injures or
2 damages or otherwise violates the rights of the plaintiff with unnecessary
3 harshness or severity, such as by the misuse or abuse of authority or power or by
4 the taking advantage of some weakness or disability or misfortune of the
5 plaintiff.
6 Model. Civ. Jury Instr. 9th Cir. 5.5 (2007); see also *Dang*, 422 F.3d at 807-08 (finding that
7 punitive damages are appropriate in section 1983 cases where there is a finding of “malicious,
8 wanton, or oppressive acts or omissions”).
9

10 The court has determined that material factual issues exist regarding whether
11 Defendants utilized excessive force. Should a fact finder believe Plaintiff's version of events,
12 i.e., that Defendants acted sadistically and maliciously in their application of force, the fact
13 finder may determine it is appropriate to award punitive damages. Therefore, summary
14 judgment as to Plaintiff's claim for punitive damages is not appropriate at this time.
15

IV. RECOMMENDATION

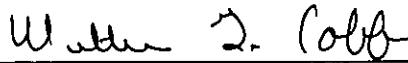
16 **IT IS HEREBY RECOMMENDED** that the District Judge enter an order that
17 Defendants' motion (Doc. # 79) be **DENIED**.

18 The parties should be aware of the following:

19 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the
20 Local Rules of Practice, specific written objections to this Report and Recommendation within
21 fourteen (14) days of receipt. These objections should be titled “Objections to Magistrate
22 Judge's Report and Recommendation” and should be accompanied by points and authorities
23 for consideration by the District Court.

24 2. That this Report and Recommendation is not an appealable order and that any
25 notice of appeal pursuant to Rule 4(a)(1), Fed. R. App. P., should not be filed until entry of the
26 District Court's judgment.

27 DATED: June 28, 2012.

28


WILLIAM G. COBB
UNITED STATES MAGISTRATE JUDGE